U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 November 2006

CASE NO.: 2005-LHC-655

OWCP NO.: 02-136151

IN THE MATTER OF:

E.S.[1]

Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier

APPEARANCES:

JOHN D. McELROY, ESQ.

For The Claimant

DELOS E. FLINT, JR., ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq., brought by Claimant against Service Employers International, Inc., a subsidiary of Kellogg Brown & Root (Employer/KBR) and Insurance Company Of The State Of Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on March 28, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 18 exhibits[2], Employer/Carrier proffered 11 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[3]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That there existed an employee-employer relationship on May 23, 2004, the date of the claimed accident/injury.

2. That the Employer was notified of the accident/injury on June 6, 2004.

3. That Employer/Carrier filed a Notice of Controversion on July 26, 2004.

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[2] Claimant's exhibits nos. 11, 13, 14, and 16 were subject to post-hearing development and never submitted into the record.

[3] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

4. That an informal conference before the District Director was held on September 21, 2004.

5. That Employer/Carrier has paid no medical or indemnity benefits to Claimant.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; whether a causal relationship exists between Claimant's alleged medical condition and employment with Employer.

2. Whether Claimant's alleged medical condition occurred during the course and scope of his employment with Employer.

3. The nature and extent of Claimant's disability.

4. Whether Claimant has reached maximum medical improvement.

5. Claimant's average weekly wage.

6. Entitlement to medical care and services.

7. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

8. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was 57 years old at time of formal hearing, and is a high school graduate. He attended two years of college, and was certified to provide traffic control training from 1997 to 2003. (Tr. 24-25). Claimant worked as a pipe fitter but was never certified. Prior to being employed by Employer, he was self-employed doing business as "MSY International" providing traffic control for the City of Houston and private contractors. (Tr. 26-27). MSY employed between four and twenty people at a time, all of whom were trained by Claimant. Claimant's 2003 income tax return shows income of $59,000 from MSY, but business had slowed prior to

his deployment to Iraq. (Tr. 28, 95-96). Claimant was not working from January 1, 2004 through February 13, 2004 (Tr. 95-96). His contract base monthly salary with Employer was $2,583.00. (Tr. 95).

Claimant sent a resume to Employer in August 2003, applying for the position of labor foreman. (Tr. 28). He was sent to I-10 Family Clinic for a physical and was examined by Employer medical staff. Claimant stated he was told he passed the examination but must obtain a release from Dr. Sdringola, his cardiologist, because of medical problems he disclosed. (Tr. 29). Claimant told the examiner he was diabetic and was taking medication for blood pressure, and had stents. (Tr. 30). After the release from Dr. Sdringola was tendered, Claimant was offered a job in Iraq, signed a one year employment contract, and was deployed in January or February 2004. (Tr. 30-32).

Claimant stated he filed only one employment application with Employer, which resulted in his eventual hire. (Tr. 31). He understood or assumed that any delay in hiring was the result of Employer waiting for the return of the release from Dr. Sdringola and evaluation of that release. (Tr. 31). Employer's Counsel admitted into evidence as EX-10 a page from Claimant's deposition at which he stated he had applied twice. At hearing, Claimant testified that if he stated that at deposition, upon further thought he determined it was only once. (Tr. 80)

Claimant packed personal belongings, safety equipment, and a six-month supply of medication, and flew from Houston to Dubai on a commercial Continental Airlines flight. Although he was to return home for a visit in four months, Claimant was instructed by "Dr. Houston" with Employer to bring a six-month supply of medication. In February 2004, Dr. Houston verified that Claimant had the supply of medicine. (Tr. 32-33, 105).

Claimant's luggage did not arrive at Dubai. During his 10 to 14-day lay over in Dubai, Claimant informed Employer personnel at the hotel that his bags did not arrive and filled out a report to that effect. He stated that no assistance was provided to obtain his medication. (Tr. 33-34).

Claimant had carried a 30-45 day supply of medicine onboard the plane. (Tr. 34-35). Claimant stated he did not attempt to secure more medicine in Dubai because he had the 30-45 day supply, and thought his bags would be found before his supply ran out. (Tr. 106-107). However, Claimant's bags, which contained the majority of his medicine and a blood monitoring device to monitor blood sugar, were never found. (Tr. 34, 114).

Claimant proceeded to Camp Danger in Tikrit, Iraq, where there was no pharmacy facility at which Claimant could secure medicine. (Tr. 34-35). While there, Claimant continued to take the supply of medicines he had until it ran out. (Tr. 34-35). He did not attempt to get the medications refilled because he did not believe he would receive it prior to his scheduled visit home. (Tr. 34).

Camp Danger was staffed by a medic, which Claimant believed to be a physician's assistant (PA). The PA did not provide medication of any type to Claimant. (Tr. 35). Claimant testified at deposition that "Mr. Pike (Employer's PA) e-mailed Dr. Sdringola… told him what medications he suggested that I take, and he went to the Army medic and they gave me the medication I needed." Claimant testified at hearing that the Army medic did not have all of the medicines he needed, and Claimant was only able to secure blood pressure medicine, which the Army doctor had on hand. (Tr. 35, 82-84; EX-5, p. 86).

Claimant brought and was taking the following medications while in Iraq:

Cozaar for Blood Pressure
Norvasc for Blood Pressure
Metformin for Diabetes
Avandia for Diabetes
HTZZ
Plavix and Aspirin that work together for the Heart
Prevacid for acid reflux

(Tr. 36-37).

Claimant insists that he told Employer about all medications he was taking. He has no explanation as to why such is not documented in Employer's records. (Tr. 55-56).

At Camp Danger Claimant worked twelve-hour shifts, seven days a week. (Tr. 37). He supervised a crew of Iraqis and Philippinos that did various janitorial and maintenance work. Claimant's duties were confined to the military base. (Tr. 85). During his stay at Camp Danger, Claimant experienced several occasions of mortar attacks that necessitated "jumping up in the middle of the night" to go to a bomb shelter. (Tr. 38, 112). On two occasions, bombs hit buildings in the Camp located two buildings away from Claimant's living quarters. (Tr. 40). Other job related stress factors were uncertainty over what would happen day-to-day, and a

particular incident where Claimant was reprimanded over allowing "Sgt. Major Parker" to use his radio. (Tr. 109-110). Claimant stated he felt a little shaky and weak, but thought it was the result of being tired and the conditions around him. (Tr. 38).

The majority of Claimant's stress was due to racial comments made by "Terry," another of Employer's labor supervisors. Claimant did not work directly with Terry, but came into contact with him each morning at a safety meeting held at the beginning of each work day, and at meals. (Tr. 40-41).

Terry was a constant aggravation to Claimant. (Tr. 41-45). Claimant insists that although his claim form only lists three incidents of racial slurs from Terry, the actual number was closer to three per day. (Tr. 108). Claimant informed his supervisor "Dale" several times of the harassment by Terry. At a morning safety meeting, Terry made a comment about Claimant's securing a satellite and television before him, calling Claimant a "dumb-ass nigger." Dale commented to Claimant that Terry "didn't mean it." (Tr. 41-45). Claimant changed the time of his lunch period to try to avoid Terry, but that did not seem to help. (Tr. 45-46). Claimant did not retaliate because he did not intend to allow Terry to make him lose his job. (Tr. 46). On another occasion, someone knocked on Claimant's door in the middle of the night. When Claimant answered the door, no one was there, but a doll which had been painted black was hanging from a noose attached to his doorway. Claimant did not see Terry affix the doll. He considered the event to be "very offensive." (Tr. 47).

Remarks of a racial nature are stressful to Claimant, and he has never experienced persons saying such things to his face in the United States. (Tr. 46-47). Claimant was told in advance that he would be working in a war zone and expected hazards, but did not expect conflict with fellow Americans. (Tr. 112-113). There were a total of ten supervisors, eight white and two black. (Tr. 86). Claimant did not know if the other African-American foreman had problems with Terry. (Tr. 87). Claimant stated that he "didn't mingle that much." (Tr. 87).

Counsel for Employer/Carrier noted that there was no documentation in Claimant's personnel file concerning his conflict with Terry. Claimant stated that Rick Pike, the Physician's Assistant, and Striker, the "personnel guy," were aware of his problems with Terry and made notes about it. (Tr. 91-92; EX-8, p. 86).

While in Iraq, Claimant experienced symptoms of chest pains, nervousness, and shortness of breath. (Tr. 49). Both he and Dr. Jones thought it could probably be controlled with medication and diet, but Employer chose to send him home. (Tr. 48). Claimant returned to the United States in May 2004. (Tr. 49).

Claimant has experienced additional stress since returning from Iraq. Claimant had gallstones removed, and was diagnosed by Dr. Sdringola with arthritis in his neck and shoulder. (Tr. 92-93). He had a coronary "robotic procedure" that was not successful, and a subsequent procedure in April or May 2005 to correct the robotic procedure. (Tr. 94). Additionally, Claimant's home was damaged by Hurricane Rita on September 26, 2005, and he was displaced until about three weeks prior to this proceeding, when he reoccupied his home. (Tr. 53-54). He stated he has had basically the same physical problems since returning to the United States that he had in Iraq, and stress from the storm contributed to those problems. (Tr. 87).

Upon his return, Dr. Sdringola was on vacation, so Claimant presented to Dr. Fujise, an associate. Claimant was diagnosed with a heart blockage. Medication and an attempted stint procedure were unsuccessful. (Tr. 50). A "robotic" heart surgery to clear the blockage was performed by Dr. Porat on October 12, 2004. The surgery was unsuccessful because the artery "closed back up." An intrusive second procedure was performed in March or April 2005. (Tr. 51). Dr. Sdringola presently provides Claimant's cardiac care which currently consists of cardiac rehab therapy and medication. (Tr. 51). Claimant's diabetes is currently treated by Dr. Victor Lavis. (Tr. 52). Claimant currently exercises at cardiac therapy and on his own, and has changed his diet. Claimant's weight is currently less than prior to his deployment to Iraq. (Tr. 52-53).

Claimant stated Dr. Sdringola had released him to return to work, but recanted stating that none of his doctors have released him. He is currently restricted from lifting over five pounds, no climbing is allowed, and his diet is restricted. (Tr. 51, 54). He has not worked since returning from Iraq. He applied for Social Security Disability which he is currently receiving. (Tr. 55).

On cross-examination, Claimant confirmed he has an extensive medical history. (Tr. 56). He had a stent implantation and angioplasty in August 2002 performed by Dr. Sdringola. On October 14, 2002, Claimant presented to Dr. Sdringola complaining of shortness of breath without activity. He was on multiple medications. (Tr. 58). Claimant again presented in December 2002 and January 2003 with chest pains and shortness of breath, and two additional medications were added. (Tr. 59-60). Claimant had a second stint implantation on January 16, 2003. (EX-2, p. 11).

Presently, Claimant is taking essentially all of the same drugs he was taking in 2002, with the exception of the addition of insulin. (Tr. 59-60).

On cross-examination, Counsel for Employer/Carrier noted several discrepancies between Claimant's medical history and information in Employer's records that was supplied by Claimant. Claimant's January 2003 stent implantation was not listed on his employment application dated October 21, 2003, although the form asked for any surgeries in the past twelve months. Claimant responded that he had not left it out, stating "we had verbally talked about all this before." (Tr. 61-62). Counsel pointed out that Claimant had failed to check the appropriate box indicating prior chest pain. Claimant acknowledged that he did not check the box but stated he discussed it with "the person that did the seminar." (Tr. 63). The box indicating heart/chest surgery had also not been checked. Claimant did indicate on the form that he had diabetes and high blood pressure. (Tr. 64).

Counsel for Employer/Carrier further questioned Claimant regarding his answers to health questions on Employer's application. (EX-5). Claimant answered "No" to the question asking if he had ever had the condition of angina because he thought angina was the same thing as a heart attack. (Tr. 64-65). Claimant acknowledged that he had circled "Yes" to high blood pressure, but failed to answer the next question: "Is the high blood pressure under control." (Tr. 65). When asked why he answered "No" to a series of questions concerning chest pain or tightness in the chest, Claimant stated "I talked to the person and they told me how to go about answering my questions. I did what I was told to do." (Tr. 65-66). Claimant acknowledged that he answered "No" to a question asking if he was currently taking medications for heart trouble, and signed the questionnaire statement certifying that the foregoing was true to the best of his knowledge. (Tr. 67-69).

Counsel for Employer/Carrier pointed out a medical notation on EX-5, page 36 dated October 20, 2003, of "Fail - DM on Meds" which meant Claimant had failed his medical clearance for diabetes mellitus, "on meds." Claimant denied he was ever told he failed the medical exam. Claimant, referring to the medical clearance forms he had been given to deliver to his treating physicians, stated "That's why they sent me, gave me that other application to take and have redid." (Tr. 70-71; EX-5, pp. 22, 27, 36).

Claimant testified that regarding his diabetes he was only told that to qualify for service in Iraq, "you couldn't be on insulin," and that being on insulin would reject you. This statement was made to Claimant by "Dr. Houston" upon his

application to Employer. (Tr. 161). Dr. Patron with Employer testified that there was no Dr. Houston employed by Employer at that time, but there was a Josh Houston, an administrator who worked with Dr. McShane at the time of Claimant's application process. Josh Houston is listed on the forms that would have been given to Claimant upon application in October 2003. Mr. Houston was involved in the medical process although he was not a doctor. (Tr. 162-163; EX-5, p. 22).

On an Emergency Medical Data Sheet dated February 4, 2004, Claimant listed "none" under "Previous Illnesses or Exposure to Hazardous Substances," and "n/a" under "Current Medications." (EX-5, p. 43). Claimant stated this information was already on another sheet and he filled out the form as instructed. Claimant stated that "n/a" did not mean he was taking no medications. He stated that the "lady who was doing the thing" wrote the question mark behind the "n/a" and stated it was because she already had a list of the medications. (Tr. 72-74; EX-5, p. 43). A subsequent Emergency Medical Data Sheet completed on February 6, 2004, also listed "none" under both "Previous Illnesses," and "Any Other Medical Conditions That Emergency Medical Providers Should Be Aware Of." (Tr. 75-76; EX-5, p. 68). Claimant listed three different answers to the "Current Medications" question; he noted "diabetes, blood pressure" on October 21, 2003, "n/a" on February 4, 2003, and "unknown" on February 6, 2004. (EX-5, p. 68). When asked why he gave the three different answers, Claimant stated "I was told to put down what I put down, and I did it because she was running the thing." Claimant insisted that the lady he spoke with had the list of medications. (Tr. 103-104).

Counsel for Employer/Carrier directed Claimant's attention to the Consultation Sheet of the Army doctor. The Army doctor noted Claimant "has not been taking BP [blood pressure] meds." Claimant confirmed that he had told the Army doctor he had not been taking blood pressure medicine because he did not have it. The doctor's provisional diagnosis was uncontrolled HTN [hypertension] and questioned whether diabetes was under control. (Tr. 88; EX-5, p.81). Kevan Mclean, an Employer Paramedic, recommended that Claimant be sent home on May 25, 2004. (Tr. 90; EX-5, p. 86). Included in the recommendation was the statement "it should be noted that with uncontrolled diabetes, mood levels can vary. With this in mind and the stress of the current situation I believe [Claimant's] mental state should be considered of importance and address[ed] by a professional counselor." (Tr. 91; EX-5, p. 86).

Claimant stated that his duties with MSY were not totally sedentary because he lifted and placed street signs and cones. (Tr. 98). He agreed that once he is "cleared" he can return to the type

of work he did for Employer in Iraq, with limitations. He stated he can do some type of work presently, but he is not sure of the type of job he can perform. (Tr. 99).

Claimant stated that he believes at this point his diabetes is controlled and his blood pressure is not. (Tr. 94). His energy level is better, but not back to normal. (Tr. 95). He is currently being treated by Dr. Sdringola for cardiac care, and Dr. Victor Lavis for diabetes. Claimant is undergoing cardiac rehabilitation, takes medication for diabetes, and has made dietary changes. (Tr. 51-53).

Dr. Douglas J. Patron

Dr. Patron is a board-certified physician in both occupational medicine and internal medicine. (Tr. 118-119). He is Associate Medical Director of Halliburton and KBR (Employer), and his primary duty is to oversee medical operations of KBR. (Tr. 118). Dr. Patron's department makes sure there is medical clearance for personnel sent overseas. (Tr. 120). Dr. Patron's department reviews only the medical records, which are maintained separate from personnel records for compliance with the Americans with Disabilities Act. (Tr. 120, 134-135).

Dr. Patron's testimony is limited to his review and understanding of Claimant's personnel file, and is not accepted as an expert medical opinion since he was not so listed before hearing. (Tr. 119). He had never seen Claimant before the hearing date. (Tr. 149).

When an applicant accepts a position, it is contingent upon medical qualification. The applicant fills out a medical questionnaire, and undergoes a series of medical tests and examinations. (Tr. 121). Dr. Patron explained that the Emergency Medical Data Sheet is used in emergency situations, "if something happens in the theater" to aid the medic in medical decisions. (Tr. 122).

Dr. Patron examined Dr. Sdringola's notes from Claimant's October 27, 2003 examination. Dr. Sdringola, Claimant's treating cardiologist, noted at that time that several medications had been discontinued. Dr. Patron outlined the functions of these various medications which regulate Claimant's diabetes and coronary artery disease, which includes treatment for hypertension. (Tr. 122-124).

Claimant initially was disqualified for being on diabetic medications, and because his blood sugar was 241, meaning his blood diabetes was not under control. (Tr. 129). A person is eligible to travel to Iraq only if they are both not taking medications to

control diabetes, have a hemoglobin A1C of less than seven, and fasting blood sugar of less than 150. (Tr. 155). Employer does allow diabetics to go overseas if they can control their diabetes with diet and exercise, and without medication. (Tr. 131-132). Persons on medication who are approved are told to take a six-month supply of medication. (Tr. 129).

Employer's policy is to tell people why they are not medically fit for a job. Dr. Patron testified that Employer would not have sent Claimant documentation that he had failed the medical screening, but opined that since Claimant did not come back until February, he probably communicated with the recruiter and was informed that he had failed. Dr. Patron does not know what, if any, communication actually took place between Claimant and the recruiter, but spoke only to the process. (Tr. 153-154).

Dr. Patron testified that Claimant would have received a release stating why he was not cleared and told "If you want to be cleared you need to take this to the doctor and come back with a sufficient release." (Tr. 129). Claimant would have been given two forms, one addressing Claimant's coronary artery condition, and the other addressing diabetes, with instructions to have his doctors fill them out. (Tr. 150; EX-5, pp. 22, 27). Claimant's doctors are to complete the forms and send them directly back to Employer. (Tr. 151). The cardiac form was signed by Dr. Sdringola, and the diabetes from was signed by Dr. Garrison. (EX-5, pp. 22, 27). Both doctors cleared Claimant to travel to Iraq. (Tr. 150). After the forms are received by Employer, Dr. Patron's department makes the final call on whether or not a candidate can go to Iraq. Dr. McShane made the final decision on travel in Claimant's case. (Tr. 152).

Dr. Patron identified the "blue sheet," an Employer internal document attached to each candidate's file. (Tr. 124-125; EX-5, p. 36). Dr. Patron stated that because of extreme working conditions, including temperature extremes and work shifts of twelve hours per day, seven days per week, "it has been decided . . . that no one with diabetes, on medications, controlled or not was allowed to go over." (Tr. 126). Claimant's "blue sheet" lists an abnormal EKG, and a note from Dr. Ricky McShane on November 11, 2003; "The release is not addressing the diabetes mellitus. He has limits placed. Also he has known coronary artery disease . . . will not qualify at this time." (Tr. 126-127). Dr. McShane made a similar notation on November 14, 2003, then notating that the lab values on the release were "unbelievable." (Tr. 128). Dr. Patron explained that hemoglobin A1C is a measure of average blood sugar over the last three to four months. Dr. McShane noted "No Way" on another form referring to Claimant's A1C value dated November 11, 2003. (Tr. 127; EX-5, pp. 27-28). It was noted by Dr. McShane that

Claimant had an A1C measure of 9.7 and was on diabetes medication on October 22, 2003. (Tr. 128; EX-5, p. 27). Dr. McShane did not believe Claimant's A1C measure could drop to 6.2 in three weeks as shown on the release form. (Tr. 128; EX-5, p. 27). Consequently, Dr. McShane did not release Claimant for travel on November 14, 2003. (Tr. 128; EX-5, p. 36).

The emergency medical data sheet dated October 21, 2003, lists a current medication as Avandia, a medication that would signal ineligibility to travel. (Tr. 133; EX-5, p. 9). Two later emergency medical data sheets dated February 4, 2004, and February 6, 2006, list current medication as "n/a" and "unknown" respectively. (EX-5, pp. 43, 68). Dr. Patron stated that when Claimant returned in February 2004, his blood sugar was 118, which was very well controlled. Therefore, since there were no medications listed, no "red flags" existed that would have prevented Claimant from traveling to Iraq. (Tr. 133). If Claimant had listed the same drugs in February 2004, as he listed in October 2003, he would have failed the medical screening a second time even with good results of the laboratory tests. (Tr. 134). Diabetes doesn't disappear, but can be delayed and controlled with exercise and lifestyle. (Tr. 135).

Coronary artery disease can be slowed, but it will not go away. (Tr. 135-136). Dr. Patron indicated that if Claimant had indicated that he had cardiac catherizations, angioplasties or stints, that would have been a "flag" in terms of clearance to travel, but would not have precluded Claimant from going to Iraq. (Tr. 136). While Employer does have employees in Iraq with controlled coronary artery disease and stents, Dr. Patron demands "the next level . . . stress test, or . . . some sort of study" that will show that the person is not at risk of a problem. (Tr. 136).

Typically, in a situation where a patient goes overseas and suddenly stops taking prescribed medications, one would expect deterioration of the condition that the medication was intended to regulate. (Tr. 138). Failure to control risk factors including diabetes would result in increased risk of further development of coronary artery disease. (Tr. 138, 139). Dr. Patron noted that Dr. Sdringola stated in his deposition that since Claimant's return to the United States, his coronary artery disease has stabilized. (Tr. 139).

Each Employer camp location in Iraq has a clinic manned by a paramedic or physician's assistant who are trained to deal with emergencies. (Tr. 139). The camps do not have pharmacies. (Tr. 149). When a medical issue arises that is beyond the scope of the Employer "medic," the patient is referred to a military doctor.

Claimant presented on May 24, 2004, to the Employer camp medic and was referred to a military doctor. (Tr. 139-140; EX-5, p. 81). Claimant's blood pressure was 175 over 99, which Dr. Patron considers "very high." He opined that it would put a person at risk for accelerating coronary artery disease or stroke. (Tr. 140-141). Dr. Bobby Jones, the military doctor, noted that Claimant had not been taking blood pressure medicines or monitoring finger sticks. Dr. Patron stated both are available "over there." The military doctor further noted medication as including Norvasc, Metoprolol, Metformin, Avandia, and aspirin. (Tr. 141; EX-5, p. 81).

On May 25, 2004, Paramedic Kevan Mclean recommended that Claimant be transported out of the camp noting that Claimant had Atherosclerotic Coronory Artery Disease, and uncontrolled hypertension and diabetes. (Tr. 144; EX-5, p. 86).

Upon return to the United States, Claimant presented to Dr. Fujise. Dr. Patron reviewed Dr. Fujise's notes dated June 23, 2004. Dr. Fujise lists non-compliance with medication as likely cause of hypertension. Dr. Patron agreed that this finding is consistent with the notes of the Employer's medic concerning non-compliance with medication. (Tr. 145).

When asked if there was a connection between Claimant being called "names" three times and the types of medical problems he experienced in Iraq, Dr. Patron opined that being angered, stressed, excited or sad can change the blood pressure and heart rate transiently. He does not believe that would have a long-term impact on coronary artery disease, diabetes, or high blood pressure. (Tr. 146). Dr. Patron agrees with Dr. Sdringola's conclusion in his deposition that if Claimant had remained compliant with his medications, it was more likely than not that he would not have had an increase in hypertension prior to returning to the United States. (Tr. 146-147).

Dr. Patron stated he has no knowledge of actual conversations between the applicant and the recruiter. (Tr. 156). The recruiter would interface with an administrative person in the Medical Department only to confirm that a person was or was not cleared for travel. (Tr. 157). Only one job application for Claimant is in the record. (Tr. 158).

The Medical Evidence

Dr. Stefano Sdringola

Dr. Stefano Sdringola is board-certified in internal medicine, cardiology, and interventional cardiology. He was deposed by the

parties on March 3, 2005, and again on February 1, 2006. (CX-8, pp. 1, 6; CX-9, p. 4). Dr. Sdringola agreed to answer questions to a "reasonable medical possibility" meaning that it is more probable than not. (CX-8, p. 7).

In 2002, Claimant was referred to Dr. Sdringola as an emergency patient with "retrosternal" chest pains, meaning pain without exertion. It was found that Claimant had unstable angina. (CX-8, pp. 8-9). Angina is symptoms of shortness of breath or chest pain. (CX-8, p. 13). At that time, an angioplasty and stent was performed on Claimant's left coronary. (CX-8, p. 9; EX-9, p. 51). The diagnosis at that time was coronary artery disease. Claimant had other risk factors of high blood pressure, hyperlipimedia (elevated fat in the blood), obesity, poor diet, and sedentary lifestyle. Claimant was treated with medication and counseled about needed lifestyle modification. (CX-8, p. 10).

Claimant continued to have some chest pain. He underwent another coronary angiogram in January 2003 to assess coronary changes. The test showed no changes, and treatment was continued. (CX-8, p. 11). No additional stents were input because the coronary area that had been treated was "patent," meaning open. (CX-8, p. 12). At that time, Claimant had only moderate disease in the right coronary artery, which did not warrant additional intervention. (CX-8, p. 13).

Subsequently, in October 2003 his symptoms resolved. Claimant had lost 16 pounds, and was walking one mile without symptoms. (CX-8, p. 11). Claimant no longer needed to take insulin due to weight loss and adjustments in his diet. (CX-8, p. 14). Dr. Sdringola did not recall what heart medications Claimant was on in October 2003, but noted "standard of care" would have been prescription of an anti-platelet agent or blood thinner like aspirin, beta blockers for blood pressure control and ischemic cardiomyopathy (restricted blood flow), blood pressure control medication and lipid lowering medications. (CX-8, pp. 14-15). Claimant's blood pressure was better controlled than in 2002. Claimant would definitely have been prescribed blood pressure medicine in October 2003, but Dr. Sdringola did not recall which particular medication. (CX-8, p. 15).

Upon returning from Iraq, Claimant saw Dr. Fujise in June 2004, because Dr. Sdringola was in Italy. (CX-8, pp. 18-19). Dr. Sdringola next examined Claimant in August 2004. At that time, Claimant was experiencing "angina pectoris," a recurrence of angina suggesting progression of coronary artery disease. (CX-8, p. 16). Claimant reported high emotional stress mainly due to racial conflict with co-workers while in Iraq for four months, and Claimant was non-compliant with medication. (CX-8, pp. 16-18). At

that time, Claimant's stress test was abnormal, and Claimant had a third cardiac catherization which found the right coronary to be totally blocked. (CX-8, pp. 19-20).

The prior stint was in the left coronary, called the LAD, and the angiogram performed in 2002 showed the right coronary was "vacant" (open). (CX-8, p. 20; CX-9, p. 16). Claimant did not have angina or chest pain before going to Iraq. He did have chest pain when he came back from Iraq, which prompted further evaluation. The finding in August 2004, after his return from Iraq, that the right coronary artery was "occluded" (blocked) was a new finding. (CX-8, pp. 20-21; CX-9, p. 16). An attempt was made to open the blood vessel with a scope through the groin, but the procedure was unsuccessful. (CX-8, pp. 20-21).

Claimant was then given the choice of continuing on medication alone or bypass surgery. Claimant chose surgery. (CX-8, p. 21). Dr. Porat, a cardiovascular surgeon with the University of Texas, performed the surgery in October 2004, and Dr. Sdringola provided follow-up care. (CX-8, pp. 24-26). The surgery was unsuccessful, and Claimant had a second surgery in March 2005. Claimant had a complication, a wound infection in his chest, after the surgery in March 2005. (CX-9, p. 8).

Concerning the relationship between Claimant's coronary problems since he returned from Iraq and the emotional stress suffered in Iraq, Dr. Sdringola stated: "It is not black or white relation in the sense that there is no proven causality . . . but certainly is what we consider a risk factor. High level of stress may increase the blood pressure, may change the blood sugar . . . so increase potentially . . . progression of coronary artery disease." (CX-8, p. 22). Dr. Sdringola stated that changes may be due to multiple causes including blood pressure, diet, or other phenomena that occur in the coronaries. A high level of emotional distress by itself does not cause coronary artery disease, but it is a concomitant factor. (CX-8, pp. 23-24). Dr. Sdringola stated that it is possible, however he cannot say probable, that the surgery Claimant underwent upon his return to the United States was precipitated by the stress and working environment in Iraq. It could have been a contributing factor. (CX-8, p. 29). Stress is a risk factor for cardiac events. It is impossible to say the exact cause. (CX-9, p. 8). Non-compliance with medications, even for one day in theory, also increases the risk of coronary artery blockages. (CX-9, pp. 17, 25).

Dr. Sdringola stated that Claimant had coronary problems and other health problems and was taking a litany of medications in 2002. It is common for persons to take ten medications to keep the risk factors under control. (CX-8, pp. 32-33). Dr. Sdringola

stated that initially Claimant had a hard time implementing a regimen to control his risk factors, which is a common thing. (CX-8, p. 34). If someone goes off of such medications, the expected result would be less control of the risk factors, thereby increasing the risk of coronary artery disease, heart attack, or even death. (CX-8, p. 34). Prior to his going overseas, Claimant was compliant with medications to the best of Dr. Sdringola's knowledge. (CX-8, p. 35). At a certain point, Claimant told Dr. Sdringola that he had stopped taking some medications. Dr. Sdringola had no reason to disbelieve Claimant's assertion. (CX-8, p. 35). Dr. Sdringola opined, judging from Claimant's personality, he would feel less stress when he was not taking medication. (CX-8, p. 37).

Dr. Sdringola reviewed Dr. Fujise's notes of Claimant's June 23, 2004 examination. (CX-8, p. 37). If Claimant was non-compliant with medications for a period of months, Dr. Sdringola thinks it is probable that the poor control of risk factors would worsen Claimant's "condition." It is possible, though not probable, that such lack of control of risk factors for that period of time would be a direct cause of Claimant's 2004 bypass surgery. (CX-8, p. 40). Dr. Sdringola stated that if risk factors were not modified, he would expect Claimant to have another occlusion (blockage) several years after the first one in 2002. With modification, the progression of the disease may be stopped. (CX-8, p. 40). Diabetes has a major deleterious effect on the circulatory system, and is a major risk factor for coronary artery disease. (CX-8, p. 42). Dr. Sdringola stated that if Claimant had taken his medicine overseas, most likely his blood pressure would have been under control. (CX-8, p. 43).

Since March 2005, Dr. Sdringola has seen Claimant five or six times. (CX-9, p. 15). Dr. Sdringola ordered a chemical stress test on Claimant which did not reveal additional evidence of progression of his [coronary artery] disease. (CX-9, p. 6). Dr. Sdringola believes that the chest pain Claimant continues to have is related to his heart surgeries, not coronary artery disease. (CX-9, p. 7). Dr. Sdringola estimates Claimant's current weight at 260 pounds. (CX-9, p. 15). A significant number of Dr. Sdringola's patients with coronary artery disease are obese, and the majority have difficulty losing weight. (CX-9, p. 26).

Since returning from Iraq, Claimant has reported high levels of stress to the point that Dr. Sdringola referred him to Dr. Carranza, a psychiatrist. Dr. Carranza prescribed medications, but Claimant has not been able to afford them. Claimant has also been under stress due to the loss of his home in a hurricane. Claimant reported that he has also not been able to afford his other medications prescribed by Dr. Sdringola. (CX-9, pp. 8-9). Dr.

Sdringola stated that he could not "give you the diagnosis of depression" prior to the loss of his home in Hurricane Rita. (CX-9, pp. 13-14).

The last time Dr. Sdringola saw Claimant in follow-up to his surgery was on January 3, 2006. Claimant was still experiencing chest pain at that time. (CX-9, p. 10). Dr. Sdringola has no reason to doubt the truthfulness of Claimant's statements to him. (CX-9, p. 25). Tests revealed that some pain on Claimant's right shoulder and chest is caused by osteoarthritis. (CX-9, p. 19). Claimant also had pain in his lower chest, and was treated for gallbladder stones. (CX-9, p. 19). Some pain may also be due to the bypass surgery itself due to damage to muscles and nerves in the chest wall. (CX-9, pp. 23-24).

Based on Claimant's current condition, Dr. Sdringola recommends that he avoid a "moderate level" of activity, meaning Claimant should not walk more than 2 blocks or one flight of stairs, and lifting over 20 pounds. Claimant is currently going through cardiac rehabilitation. (CX-9, pp. 10-11). Presently, Dr. Sdringola has only minimal concerns about Claimant "flying," but recommends that he not work in temperatures exceeding 90 degrees because of the danger of dehydration. (CX-9, p. 12). Dr. Sdringola believes Claimant could return to work in the Houston, Texas area with limitations, depending upon the type of work. (CX-9, p. 17). The level of employment activity Claimant can perform depends upon his symptoms and weight is a component. As Claimant loses weight, he should have more physical endurance. (CX-9, p. 18). About 90 percent of people that have bypass surgery return to their employment. (CX-9, p. 23). However, because Claimant has multiple medical problems, his recovery is less predictable. (CX-9, p. 22).

Dr. Sheri L. Dark

Dr. Sheri L. Dark is board-certified in family practice and was deposed by the parties on March 1, 2005. (CX-7, pp. 1, 7).

Claimant presented twice to Dr. Dark's clinic, on June 29, 2004 and August 5, 2004. (CX-7, pp. 7, 10-11). Claimant's first visit was to establish Dr. Dark as his primary care physician, and he gave a history of Type II diabetes mellitus and hypertension. An initial evaluation was performed that included various tests. Claimant's blood sugar was slightly elevated, and hemoglobin was low. (CX-7, pp. 8-9). A subsequent test of hemoglobin at Claimant's second visit showed a normal level. (CX-7, p. 10).

Claimant was on medication for diabetes at that time. (CX-7, p. 9). Claimant indicated at his first visit that he had been back from Iraq for approximately one month, and the conditions in Iraq were very stressful. He did not allude to specific reasons for his stress. (CX-7, p. 11).

Claimant presented on August 5, 2004, as follow-up to an emergency room visit on July 21, 2004. Claimant's blood pressure was 150/98 on his second visit, and 182/90 on his first visit. (CX-7, pp. 17-18). His blood pressure had dropped despite the fact that he had forgotten to take his blood pressure medication for one day. (CX-7, p. 18). Claimant's blood sugar increased since the initial visit, indicating Claimant was having a "hard time" controlling the blood sugar. (CX-7, pp. 8, 32).

"A1c" is averaged over six to eight weeks and is a representative measure of diabetes. (CX-7, pp. 13-14). An A1c level of 6.5 is considered the upper limits of "normal," and 7 or less is considered "tight control" of diabetes. (CX-7, pp. 14-15).

The severity of diabetes ranges from minimal problems to insulin dependency. On that continuum, Dr. Dark opines Claimant is closer to the end that can be regulated with diet, exercise, and medication, as long as he maintains that regimen. (CX-7, pp. 15-16). Diabetes is a progressive disease. Early management can slow the progression of the disease. (CX-7, pp. 16-17).

Stress contributes to high blood pressure by causing elevated adrenaline, the catecholamines or "fight or flight" enzymes. (CX-7, pp. 19-20). Extended periods of stress is recognized as a factor that should be avoided by persons with high blood pressure. (CX-7, p. 20). High blood pressure leads to coronary artery disease. (CX-7, p. 20). Dr. Dark opined it is possible that the stress experienced by Claimant in Iraq contributed to Claimant's high blood pressure. (CX-7, p. 21). Stress is also a contributing factor to exacerbation of Type II diabetes. However, Dr. Dark opined that given the readings, it is unclear whether stress experienced by Claimant in Iraq contributed to elevating his diabetes. (CX-7, p. 21). About 50% of Dr. Dark's patients have some form of diabetes and/or high blood pressure. Avoidance of emotional stress is routinely recommended by Dr. Dark for treatment of these conditions. (CX-7, p. 22). Stress is an exacerbating factor, but the underlying coronary disease has a normal progression absent stress and other life factors. (CX-7, p. 28).

Dr. Dark agreed that a misrepresentation in order to get a job or being deprived of one's medications may in themselves be stressors. (CX-7, p. 34). She also opined that in the situation where an employer had provided an extensive physical but did not

find a medical problem, misrepresentation of a physical condition would not be a stressor, rather "most people would be quite happy." (CX-7, p. 37).

Claimant is obese which is also a risk factor for coronary problems and exacerbates diabetes. (CX-7, p. 29). Non-compliance with medications may also be a stress factor and can lead to further complications. (CX-7, p. 28). Non-compliance for more than a day or two would be a matter of concern for Dr. Dark, and she would expect Claimant's condition to worsen if he fails to take his medications (CX-7, pp. 28, 33-34). Dr. Dark opined it is highly unlikely that Claimant can control his conditions without medication. (CX-7, p. 30). Non-compliance with medications could be a contributing factor to Claimant's problems which existed when he presented to Dr. Dark in June 2004. (CX-7, pp. 30-31).

Dr. Dark prepared a letter to James McIntyre, an insurance adjuster for AIG on August 2, 2004, in regards to Claimant's coronary artery disease, hypertension, and Type II diabetes. (CX-7, p. 18). At the time she wrote the letter, Dr. Dark had not reviewed medical information from Texas Center pertaining to Claimant's medical history prior to deploying to Iraq. (CX-7, p. 24). The letter opines "It is certainly possible that his stress would contribute to the increase in blood pressure. Stress management is recommended." (CX-7, p. 50).

Dr. Dark has not seen Claimant since his last visit on August 5, 2004. At that time, his Type II diabetes mellitus was being moderated by medication, but not his hypertension or coronary artery disease. (CX-7, p. 27).

Dr. Dark opined that Claimant's ability to return to work as a supervisor of a construction crew would depend upon the recommendations of his cardiologist and the results of a stress test evaluation. If both of those were favorable, Claimant could probably return to such employment. Because of Claimant's cardiac history, Dr. Dark would defer to the recommendation of his cardiologist. (CX-7, p. 31).

The Contentions of the Parties

Claimant contends that he is temporarily totally disabled because he has not reached maximum medical improvement for conditions related to aggravation of his pre-existing medical conditions, and that his total disability began on May 23, 2004 and continues. Specifically, Claimant contends that he currently experiences pain and medical restrictions that are the direct result of surgery to treat his coronary artery disease which was aggravated by employment-related injury and conditions. He

contends he is unable to return to his former job, that Employer has failed to demonstrate suitable alternative employment, and he is entitled to compensation, medical expenses, interest, and attorney's fees. Claimant contends he is entitled to penalties due to Employer/Carrier's failure to timely controvert the claim.

Employer/Carrier contend that Claimant did not suffer a compensable accident or injury related to employment. Rather, Claimant's condition is the result of non-compliance with medications or is a natural and unavoidable progression of the condition. They contend that non-compliance with medication was the sole fault of Claimant in that he lied to obtain employment thereby misleading Employer as to his need for medication, may have failed to bring needed medications, had opportunity to replace medications prior to arrival in Iraq and did not, and delayed seeking medical help from Employer medical personnel in Iraq. Any stress experienced by Claimant in Iraq did not adversely affect his medical condition. Employer/ Carrier further contend that Claimant is not economically disabled.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in

matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). When something unexpectedly goes wrong within the human frame, there has been an "injury" according to the Act. See Wheatley v. Alder, 407 F.2d 307 (D.C. Cir. 1968).

Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant testified that he experienced chest pains, nervousness, and shortness of breath while in Iraq. Claimant was certified as fit to travel upon his departure for Iraq by Dr. McShane of Employer in February 2004, although Employer now contends such clearance was granted in reliance on false information. In May 2004, Kevan Mclean, Paramedic of Employer, made the recommendation that Claimant be sent home due to his medical condition which was diagnosed by the Army doctor as uncontrolled hypertension and questionably controlled diabetes. Therefore, Employer's internal records have documented deterioration in Claimant's physical condition while in Iraq.

Dr. Sdringola testified about the progression of Claimant's coronary artery disease. In January 2003, tests showed Claimant had only moderate disease in the right coronary artery. In October 2003, Dr. Sdringola returned Employer's form clearing Claimant for travel. In August 2004, Claimant was experiencing "angina pectoris" which suggested to Dr. Sdringola a progression of coronary artery disease. Dr. Sdringola's suspicion was confirmed by a subsequent cardiac catherization which found the right coronary artery to be totally blocked, prompting surgery. Although Dr. Fujise, Dr. Sdringola's associate, examined Claimant in June 2004, and did not find evidence of a blockage, he stated that Dr. Sdringola, the treating cardiologist, was the best person to treat and render an opinion on Claimant's condition. Therefore, the medical record documents a progression of Claimant's coronary artery disease from January 2003 to August 2004, with some probable progression occurring between October 2003 and August 2004.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Based on the foregoing, I find that Claimant suffered an injury within the purview of the Act, i.e., a deterioration of his condition. The question then is whether or not the injury arose in the course of employment, or if conditions existed at work, which **could have caused** the harm. Claimant contends two employment conditions existed which could have caused the harm. First, Claimant contends that workplace stress alone could have caused or exacerbated the harm. Secondly, that workplace stress combined with Employer's failure to provide aid or available means to Claimant to replace medication lost en route which also contributed to or exacerbated the condition or harm.

Claimant advances the proposition that availability of medications is an "obligation or condition" of employment in a "zone of special danger," and as such can constitute a working condition under the Act. In support, Claimant points to O'Keeffe v. Pan American World Airways, 338 F.2d 319 (5th Cir. 1964), and O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1981), both cases involving death of persons engaged in recreational activities. I find in the instant case, availability of medication is a direct condition of the employment.

Stress

It is well-settled that work-related stress may constitute a condition which could cause physical or mental injury. Marinelli v. American Stevedoring, Ltd., 248 F.3d 54, aff'g 34 BRBS 112 (CRT) (2d Cir. 2001). However, a psychological injury resulting from a legitimate personnel action, such as a reduction-in-force is not compensable under the Act. Marino v. Navy Exchange, 20 BRBS 166 (1988). Workplace stress which is not the result of a legitimate personnel action need not be unusually stressful to constitute such a condition. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1998)(BRB held that since the claimant's ordinary working conditions could have caused his chest pains, claimant established a **prima facie** case that his chest pains arose out of and in the course of his employment). The proper inquiry is not the objective level of stress, but rather how the stress affected Claimant. See Konno v. Young Brothers, Ltd., 28 BRBS 57 (1994)("while some of the work-related stress may seem relatively mild, the issue is the effect of these incidents on [Claimant]").

Claimant credibly testified to several factors which caused him to feel stress while in Iraq including conflict with a fellow employee, an incident of reprimand, interruption of sleep by explosions, and uncertainty of being in a war zone. Employer/Carrier offered no direct rebuttal to Claimant's testimony regarding these factors. Rather, Employer/Carrier allude to Claimant's conflict with fellow employees as resulting from "mood swings" which may have stemmed from his non-compliance with medications. Two of Claimant's treating physicians testified Claimant reported that he had been under high levels of stress while in Iraq. Additionally, Claimant's treating cardiologist testified it is possible, though not probable, that Claimant's by-pass surgery was precipitated by the stress and working environment in Iraq.

Did restricted availability of medication constitute a work-related condition which could have caused the harm?

Dr. Patron testified that Employer allows diabetics to go overseas if they can control their diabetes with diet and exercise, and without medication. Not all of the medications Claimant had previously taken would disqualify him for employment with Employer, rather only the medication to control diabetes. Approved persons on medication are told to take a six-month supply of medication. He further testified that each camp is staffed with a "medic" who is trained to deal with emergencies. When situations arise beyond the scope of the medic's capabilities, the person is sent to an Army doctor.

Claimant was initially rejected for employment by Employer because of his blood sugar level and diabetes mellitus. Dr. Patron articulated the chronic nature of diabetes in stating that it "doesn't disappear, but can be delayed and controlled with exercise and lifestyle." Claimant was later accepted for employment by Employer because he purportedly was successful in controlling his conditions through diet and lifestyle.

Claimant credibly testified that his luggage containing medication, "finger stick" supplies for monitoring his condition and safety equipment was lost by the airline, which was reported to Employer. While Employer advances a theory that Claimant may have not brought enough medication, there is nothing in the record to substantiate such a theory. The undisputed medical record indicates that Claimant was not monitoring his diabetes by doing "finger sticks" nor taking blood pressure medicine at the time he was treated by the Army doctor, which is consistent with Claimant's testimony that the supplies were lost with his luggage. Claimant also testified that the only medication he received was from the Army doctor and that the medic dispensed no medication to him. However, Dr. Patron stated that both medicine and supplies were available "over there." This testimony was uncontroverted. Since there were no pharmacy facilities in the camp, arguably the blood pressure medicine and diabetes monitoring supplies were available only from the Army doctor.

Claimant's treating cardiologist stated that in theory, failure to medicate even for one day increases the risk of coronary artery blockages. Dr. Dark, another treating physician, stated she would expect Claimant's condition to worsen if he fails to take his medications.

In a situation where a diabetic, who is obese and who heretofore controlled his condition with diet and lifestyle, is deployed to a war zone to work twelve-hour days, seven days a week,

I find, based on the medical evidence of record, it is reasonable to expect and foresee that the individual's physical condition may deteriorate due to conditions presented by his employment. Absent ready access to replacement medication or supplies to monitor one's condition, it is also reasonable to expect an individual to be unaware of deterioration in such a condition until symptoms surface, or possibly to delay pursuit of securing medication or diabetes monitoring supplies. The medical testimony indicates that such a delay or failure to medicate, even for a short period, may result in harm.

It is noted that while Claimant's failure to secure replacement medication and "finger stick" supplies to monitor his condition while in Dubai or afterward may constitute an intervening or supervening cause to break a chain of liability, such failure by Claimant does not alter the working condition as it existed.

Based on the above, I find and conclude both workplace stress and/or non-availability of medications independently constitute conditions that existed at work, which **could have caused** the injury to Claimant or aggravated his pre-existing condition.

Thus, I find Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on May 23, 2004, and his working conditions and activities on and prior to that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns, supra.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with **substantial evidence** to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary

standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148. "If claimant's work played any role in the manifestation of the disease, then the non-work-relatedness of the disease . . . [is] irrelevant; the entire resulting disability is compensable." Cairns, supra.

The Board has held that the "arising out of . . . the employment" requirement of Section 2(2) is a separate issue from the Section 3(c) "willful intention to injure" inquiry. Jackson v. Strachan Shipping Company, 32 BRBS 71 (1998). Thus, even if an injury has arisen out of and in the course of employment, it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself or another. Id. However, the inquiry as to whether recovery is barred because of employee misconduct does not enter into the determination of whether an injury arose out of employment.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

In the instant case, Employer/Carrier contend that any advancement to Claimant's coronary artery disease is the result of natural and unavoidable progression, non-compliance with medication, stress suffered after return to the United States, or a combination of those factors, irrespective of events in Iraq. They further contend that disputes with a co-worker did not contribute to or aggravate Claimant's condition, and to the extent that non-compliance with medication contributed to or aggravated Claimant's condition, such non-compliance did not arise out of the employment and was the result of willful acts of Claimant alone, for which Employer/Carrier have no responsibility. Further, Claimant's actions of falsifying information on his job application, non-compliance with medication, and lack of diligence in securing replacement medicine and medical care served as intervening or supervening causes to sever **any** connection between his injury, if any existed, and his employment.

The medical testimony is consistent in recognition that diabetes, high blood pressure, obesity, stress, and non-compliance with medication are risk factors in coronary artery disease. The record evidence indicates that several of these factors, diabetes, high blood pressure, and obesity existed, either in a controlled or uncontrolled state, prior to deployment of Claimant to Iraq. Dr. Dark testified that coronary disease has a normal progression absent stress and other life factors. If substantial evidence exists to support a determination that deterioration in Claimant's coronary artery disease was **solely** the result of the natural progression of the disease or risk factors which existed prior to Claimant's deployment, and such risk factors were not aggravated by employment conditions, the injury cannot have arisen out of his employment and the presumption of compensability would be effectively rebutted.

However, no medical testimony or other evidence has been introduced to support a contention that progression of Claimant's coronary artery disease was solely the result of a natural progression of the disease. While testimony established that stress and non-compliance with medication were risk factors, no evidence has been introduced to rebut the contention that Claimant suffered stress while in Iraq, or that accessibility to medicine and monitoring equipment was restricted to some degree at Claimant's assigned location in Iraq.

Dr. Sdringola testified that he thought it probable that Claimant's condition would be worsened by the poor control of risk factors that would result from Claimant's non-compliance with medication for a period of months. A period of up to two months of non-compliance with medication preceded Claimant's return to the

United States. He further testified that it was possible though not probable that the stress suffered by Claimant in Iraq precipitated Claimant's coronary event. Finally, Dr. Sdringola stated that such changes may be due to multiple causes. Therefore, the medical testimony supports a conclusion that stress and non-compliance with medication while in Iraq were contributing factors to progression of Claimant's risk factors, thereby aggravating, in part, the underlying condition of coronary artery disease.

While falsifying information on his job application, non-compliance with medication, and lack of diligence in securing replacement medicine and medical care, are relevant inquiries regarding "willful intent to injure" under Section 3(c) or as intervening or supervening causes to bar recovery, such actions are not relevant to the determination of whether or not Employer/Carrier has rebutted the **prima facie** case established by Claimant. Claimant's non-compliance with medication and diligence of securing medical care are events that arose from his employment because of the work location and non-availability of medicines and medical care, which are conditions of his employment.

Accordingly, I find and conclude that Employer/Carrier have not introduced substantial evidence sufficient to rebut Claimant's **prima facie** case.

3. Conclusion or Weighing All the Evidence

Assuming, **arguendo**, that Employer/Carrier provided sufficient evidence to rebut Claimant's **prima facie** case, I will proceed to weigh all the record evidence.

The majority of medical testimony does not contribute the advancement of Claimant's coronary artery disease to a single cause, but establishes that non-compliance with medication while in Iraq and stress are both risk factors contributing to the aggravation of coronary artery disease. Dr. Fujise, associate of the treating cardiologist, reported that non-compliance with medication was the likely cause of Claimant's uncontrolled hypertension upon his return from Iraq, a conclusion with which Dr. Patron of Employer agreed. Dr. Sdringola, Claimant's treating cardiologist, testified that if Claimant was non-compliant with medications for a period of months, the resulting poor control of risk factors would worsen Claimant's condition. He also stated that coronary changes may be due to multiple causes. Drs. Sdringola and Dark both testified as to the detrimental effect of stress. Finally, Employer/Carrier strongly advance the theory that the most probable cause of deterioration in Claimant's condition is non-compliance with medications.

Claimant departed Houston for Iraq on February 14, 2004, according to his travel itinerary. He returned to the United States on or about May 26, 2004, a period of approximately fifteen weeks. Claimant testified that he carried onboard the airplane a thirty to forty-five day supply of medicine, which he took until it ran out. This would result in a period of one to two months, about April 2004 and/or May 2004, that Claimant was in Iraq without medication. The medical record establishes that Claimant's blood pressure, which had been controlled prior to Claimant's departure for Iraq, deteriorated into uncontrolled hypertension. It was during this same period in Iraq that Claimant testified he was under extreme stress. The timing of the manifestation of Claimant's symptoms indicates that injury, specifically aggravation of Claimant's coronary artery disease, occurred during the months that Claimant was in Iraq, and was the result of multiple causes including stress and non-compliance with medications, as Dr. Sdringola opined would be the case.

Claimant's burden is not to show that work-related injury or accident was the only cause of harm. Rather, if Claimant establishes that his work environment played any role in the manifestation of the disease, the non-work-relatedness of the disease itself is irrelevant. Cairns, supra.

Accordingly, I find that Claimant has established that his injury of progression in his coronary artery disease was, in part, the result of Claimant's non-compliance with medication while in Iraq and workplace stress, both of which are related to Claimant's work environment. Therefore, absent an intervening or supervening cause or bar to recovery, Claimant has established his entitlement to benefits under the Act.

4. Section 3(c) Misconduct / Intervening or Supervening Cause / Equitable bar to recovery

Employer/Carrier advance three theories as bars to recovery, all based on Claimant's conduct.

Employer/Carrier contend that Claimant secured employment under false pretenses and made false statements on his employment application. Indeed, this contention is supported by multiple discrepancies and omissions in various documents which were filled out by Claimant. Claimant contends that he completed the forms in the manner in which he was instructed by Employer's recruiter. Employer/Carrier also point to Claimant's failure to secure medication in Dubai when he had the chance to do so, and his delay in seeking medical attention as bars to recovery.

Employer/Carrier contend these acts constitute misconduct by Claimant that should bar recovery either as affirmative misconduct which is addressed by Section 3(c), as an intervening or supervening cause of the harm, or alternatively, that an equitable bar to recovery should be recognized to prevent Claimant from profiting from his own misconduct. Employer/Carrier further contend that Claimant suffered additional stress after returning to the United States which may be a supervening cause of his present condition. Any such bar to recovery would preclude Claimant's entitlement to benefits despite his establishment of and Employer/Carrier's failure to rebut the **prima facie** case. Each theory is addressed in turn below.

a. Section 3(c) Misconduct

Section 3(c) of the Act sets forth the following exclusion from coverage:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

The Board has held that misrepresentation of Claimant's physical condition on an employment application prior to hire, without more, is not an automatic bar to recovery. The Board stated "claimant's knowing and willful misrepresentation of his physical condition to employer prior to being hired did not bar him from receiving compensation." Hallford v. Ingalls Shipbuilding, 15 BRBS 112 (1982) citing Hall v. Newport News Shipbuilding & Dry Dock Co., 674 F.2d 248, aff'g 13 BRBS 873 (CRT)(4th Cir. 1982). The Board extended this holding to a situation where claimant was informed of a work restriction not to drive after hire, but did not inform Employer and continued to drive causing injury. The Board held that the conduct did not rise to the level of willful intent as required by Section 3(c). Jackson v. Strachan Shipping Co., 32 BRBS 71 (1998).

The Board's reasoning is explained in Jackson, supra, as premised upon the fact that the bar to recovery provided under Section 3(c) requires "injury occasioned **solely** by the intoxication of the employee or by the **willful intention** of the employee **to injure or kill** himself or another." Therefore, an act by an employee which is not due to intoxication and lacks specific intent does not prohibit recovery by Claimant. Additionally, Section 20(d) affords Claimant the benefit of the presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." Jackson, supra. Although negligence may be a standard in establishing an

intervening or supervening cause of a secondary injury, the standard for misconduct under Section 3(c) is willful intention. Therefore, specific intent may not be assumed, but requires support by substantial evidence.

The Board further noted that non-recognition of a misrepresentation defense does not impair an Employer's ability to establish entitlement to Section 8(f) relief, inasmuch as Employer need not show actual knowledge of a pre-existing condition in order to fulfill the requirements of that section. Hallford, supra.

Therefore, absent substantial evidence that Claimant's act of misrepresentation of facts on his employment application, failure to secure medicine in Dubai, or delay in seeking medical treatment, was done with the specific intent to injure himself or another, this defense will not bar recovery by Claimant under the Act. As no evidence was introduced to suggest that Claimant acted affirmatively to injure himself by any of the acts described above, I find that any misrepresentations by Claimant on his employment application and accompanying paperwork, failure to procure medicines in Dubai, and delay in seeking medical aid in Iraq, do not constitute acts sufficient to bar recovery under Section 3(c) of the Act.

b. Intervening/Supervening Cause

If there has been a **subsequent non-work-related injury or aggravation**, the Employer/Carrier are liable for the entire disability **if** the second injury or aggravation is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, supra; Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. Plappert v. Marine Corps Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second injury. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The U.S. Fifth Circuit Court of Appeals has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n., which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the Court in Mississippi Coast Marine v. Bosarge, held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the Court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause."

A misrepresentation may constitute a supervening cause of a subsequent injury if it is an independent cause that is the direct cause of the second injury. Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1051 (5th Cir. 1983). In Bludworth the Fifth Circuit held that the failure of a former drug addict to inform physicians treating his work-related injury, of his former addiction was a supervening cause of a secondary addiction thus relieving Employer of responsibility for the resulting drug rehabilitation therapy charges.

In the present matter, Claimant suffered an existing underlying condition of coronary artery disease prior to beginning work for Employer, which was not a prior compensable injury. Claimant's misrepresentation of medical facts on his employment application and failure to secure medicine in Dubai cannot constitute an intervening or supervening cause because no prior compensable injury had been suffered at that point. Claimant's delay in seeking medicine and medical care after he ran out of medicine is a purported cause of aggravation of Claimant's underlying condition. This conduct also cannot be said to aggravate a prior compensable injury, rather it is a cause of the compensable injury suffered while employed by Employer. None of these events are independent of the conditions of the employment from which the injury arose. Additionally, while these acts may

have been negligent, the impact on Claimant's underlying condition was not a readily foreseeable result of these actions. Therefore, I find that none of these events constitute an intervening or supervening cause of the injury.

Employer/Carrier contend that stress suffered by Claimant after return to the United States, including divorce and loss of his home in a hurricane, may have contributed to the worsening of Claimant's condition. Claimant was apparently non-compliant with medications after his return to the United States telling a treating physician in June 2004, that he was not taking medication because the package had not yet arrived from Iraq. Employer/Carrier advance the theory that these were personal problems of Claimant that caused or aggravated his medical problems. It is noted that Claimant's home was lost in Hurricane Rita in September 2005, well after his last by-pass surgery in March 2005.

These events are independent of the employment. While it cannot be said that Claimant's post-Iraq stress and non-compliance with medication "overpowered and nullified the initial injury," it can be argued that it contributed to deterioration of Claimant's condition to some extent. This conclusion is supported by the medical testimony regarding the detrimental effects of stress and non-compliance with medication. Under a "worsening" standard as stated above, these acts by Claimant could give rise to a supervening cause.

The medical record does not specifically document the progression of Claimant's underlying coronary artery disease. Therefore, it is not possible to allocate the deterioration between aggravation occurring in Iraq and any further progression caused by later stress and non-compliance with medication. As noted above, where the disability between the two injuries cannot be apportioned, it is appropriate to hold employer liable for benefits for the entire disability. Therefore, I find that post-Iraq stress and non-compliance with medication are not an intervening or supervening cause of the injury.

Consequently, I find that Employer/Carrier have not established that an intervening or supervening cause has served to break the chain of causation barring recovery.

c. Equitable bar to recovery

Employer/Carrier contend that Claimant misrepresented his physical condition to both Employer and Claimant's cardiologist, and secured employment under false pretenses. If Employer had

known of Claimant's true medical condition, he would not have been offered employment. They argue that Claimant should not now be allowed to profit from his own misdeeds.

In support of this position, Employer/Carrier cites Kirkland v. Air America, Inc. for the proposition that courts have used the exception under Section 3(c) to prevent a Claimant from profiting from their own misdeeds. Kirkland v. Air America, Inc., 23 BRBS 348 (1990), aff'd sub nom. Kirkland v. Director, OWCP, 925 F.2d 489 (D.C. Cir. 1991). Additionally, Employer/Carrier argue the unfairness of allowing recovery for injury caused by affirmative misconduct and deception.

I find merit in the academic argument that a wrongdoer should not be allowed to profit from his wrongdoing. However, the facts of this case do not support a bar to recovery either under Section 3(c) or equitably. As noted above, Claimant's conduct complained of here lacks the element of willful intent.

The Kirkland court in dicta noted that the Claimant, the employee's widow, should not be allowed to recover benefits for the murder of her husband in Laos in which she was a knowing and willing participant. Such culpability is not analogous to the present case. Culpability requires foreseeability. In the instant case, the general hazards of the work environment were the only element of Claimant's stress that were foreseeable. Conflict with a co-worker that precipitated stress and loss of luggage which precipitated non-compliance with medication was not foreseeable. In short, there is no legal basis for an equitable exception to bar recovery. If the undersigned was to consider granting such an exception, Claimant's actions in this case are not of the caliber that would warrant this extension of the law.

Accordingly, I find that there is no basis for barring recovery for equitable reasons or under Section 3(c).

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant's treating cardiologist, Dr. Sdringola, has imposed work limitations of: walking no more than 2 blocks, lifting over 20 pounds, and exposure to temperatures not exceeding 90 degrees because of the danger of dehydration. He states that Claimant should avoid even a "moderate level" of activity. Dr. Sdringola stated that the level of employment activity Claimant can perform depends upon his symptoms and body weight is a component. If Claimant loses weight, he should have more physical endurance.

Claimant stated he could return to the type of employment he performed in Iraq once he is released by his doctors. The testimony is not clear as to whether or not Claimant believes he could once again perform those duties in Iraq or a similar working environment. Claimant currently experiences chest pain which Dr. Sdringola believes is related to the bypass surgery. Claimant's coronary artery disease has stabilized. He is currently undergoing cardiac rehabilitation and has made dietary changes to lose weight.

Since temperatures at Claimant's former work location of Tikrit, Iraq exceed the recommended maximum, I find that Claimant is unable to perform his usual employment in Iraq under his current restrictions. Given Claimant's limited walking and lifting restrictions, I find Claimant cannot return to his former job with Employer in Iraq.

Over a year has now elapsed since Claimant's cardiac surgery. His treating cardiologist does not believe Claimant's current symptoms are related to his underlying cardiac condition. Both Claimant and his treating cardiologist have outlined Claimant's present work ability. Although Claimant and his physician expect his condition to improve, neither can state definitively if, when, or to what extent Claimant may progress. Claimant's condition has now stabilized. Improvement in Claimant's physical condition is dependant upon his therapy and weight, which Dr. Sdringola stated is difficult for him to control. Claimant is currently on Social Security disability.

Because Claimant's medical condition, particularly his coronary artery disease has now stabilized and any future improvement is questionable at best, I find and conclude that Claimant has reached maximum medical improvement. A definitive date as to when Claimant's condition became stable is not stated in the record. The last problem noted by Dr. Sdringola that was directly related to Claimant's coronary artery disease was an infection following his March 2005 surgery. Claimant's coronary artery disease had stabilized prior to Dr. Sdringola's February 2006 deposition, and presumably prior to Claimant's last examination by Dr. Sdringola in November 2005.

Based on the foregoing, and in the absence of contrary evidence in the record, I find that Claimant reached maximum medical improvement on April 30, 2005. Consequently, I find that Claimant was temporarily totally disabled from May 23, 2004 through April 29, 2005, and permanently totally disabled from April 30, 2005 and continuing, as a result of his work-related condition.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Dr. Sdringola opined that Claimant can currently perform work in the Houston, Texas area and has outlined specific work restrictions. Claimant stated that he was presently capable of doing the type of work he did for Employer with restrictions. He stated that his duties at MSY included lifting of street signs which may be outside of his 20-pound lifting restriction.

However, Employer/Carrier have introduced no evidence to demonstrate available employment within Claimant's job restrictions in the relevant community. Since no specifics of the nature or terms of any jobs were offered, I lack sufficient information to determine if suitable alternative employment exists. Because Employer/Carrier did not demonstrate suitable alternative employment, I find and conclude Claimant is entitled to temporary total disability benefits from May 23, 2004 through April 29, 2005, and permanent total disability benefits from April 29, 2005, to present and continuing.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be

applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings. Here, Claimant was a seven-day per week worker.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

In the instant case, Claimant worked for Employer for only fifteen weeks prior to injury during his first year of employment with Employer. Prior to employment with Employer, Claimant was unemployed or engaged in self-employment. Therefore, the requirement of work in the same employment for "substantially all of the year" immediately preceding the injury for a calculation under subsections 10(a) and 10(b) is not met. See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working **at the time of his injury**, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

The amount Claimant earned from Employer is documented as $22,738.63, to which the parties are in agreement. The time frame over which this amount was earned was fifteen weeks from February 14, 2004, the beginning pay date as recognized by both parties, through May 29, 2004, the period ending date of Claimant's last week of pay. Although Claimant apparently only worked through May 23, 2004, hazard and premium pay were paid through the end of the period. Therefore, the average weekly amount earned from Employer was $1,515.91 ($22,738.63 divided by 15 weeks). Claimant's 2003 Individual Income Tax return shows earnings of $59,387.00 which yields an average weekly earnings rate of $1,142.06 (59,387.00 divided by 52 weeks).

Claimant contends that his average weekly wage should be based solely on the rate earned while employed by Employer, while Employer/Carrier contend that it should be based on a weighted average of Claimant's wages, including a period of unemployment, for the 52-week period immediately preceding the injury. Employer/Carrier's calculations also deduct Claimant's 2003 tax return standard deduction for unknown reasons.

Clearly, Claimant's employment with Employer resulted in an enhanced earning capacity under his employment contract. A significant portion of Claimant's wages with Employer was based on the hazardous location. In the absence of injury it is undeterminable how long Claimant would have worked in Iraq for Employer, but arguably it would have been more than fifteen weeks. However, it is doubtful that Claimant would have worked in Iraq for the remainder of his work life.

Under the extant circumstances, I find and conclude the most appropriate, fair and reasonable method of computing Claimant's average weekly wage is to base the award on Claimant's earning power and potential within the United States averaged equally with

his earnings in the hazardous location. This reflects approximately equal future employment in hazardous and non-hazardous environments. For this reason, I reject Employer/Carrier's calculation and Claimant's calculation.

I find that Claimant's projected weekly pay while working in a hazardous environment was $1,515.91, and projected weekly pay when not working in a hazardous environment was $1,142.06. The average of these amounts is $1,328.98 ([$1,515.91 + $1,142.06] divided by 2).

Accordingly, I find and conclude that Claimant is entitled to a compensation benefit rate of $885.99, based on an average weekly wage of $1,328.98 ($1,328.98 x .6667 = $885.99), as a result of his May 23, 2004 accident and injury.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

It has been determined that Claimant suffered aggravation to an underlying condition of coronary artery disease due to injury arising from his employment, and continues to suffer symptoms related to corrective surgery for that condition. No evidence has been introduced controverting the necessity of treatment he has received.

Claimant represents in post-hearing brief that Employer/Carrier have refused to provide any medical treatment, and the parties stipulate that no medical expenses have been paid. The notice of controversion states in broad terms that Employer disputes the fact of injury and causation. I find that the position embodied in the notice of controversion constitutes initial refusal of Employer to pay for Claimant's medical expenses, thereby relieving him of the necessity of further requests to Employer for approval of medical care.

Accordingly, I find that Claimant is entitled to reasonable and necessary medical care and treatment for his work-related injuries including the aggravation of the underlying condition of coronary artery disease, and related complications and conditions from May 23, 2004 through present and continuing.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier were notified of Claimant's claimed injury on June 6, 2004, and filed a notice of controversion on July 26, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[4] Thus, Employer was liable for Claimant's total disability compensation payments on June 20, 2004. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by July 5, 2004, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on July 5, 2004, and is liable for Section 14(e) penalties on the temporary total disability compensation Claimant is owed from June 6, 2004 until July 26, 2004.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds,

[4] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. This applies to compensation only, not reimbursed medical expenses.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[5] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

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[5] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **December 28, 2004**, the date this matter was referred from the District Director.

VIII. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

Employer/Carrier served the Regional Solicitor with their petition for relief under Section 8(f) on April 5, 2006. The District Director has not filed an opposition to requested relief.

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f) Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, an additional requirement must be shown, i.e., that Claimant's disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. §908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. Pre-existing permanent partial disability

In this matter, I find overwhelming medical evidence of disability was presented that pre-existed the injury of May 23, 2004. Documentation and testimony confirm that Claimant has an extensive record of coronary artery problems including a stent implantation in 2002, numerous instances of uncontrolled hypertension, diabetes, and other cardiac risk factors. The pre-existing condition of coronary artery disease and related risk factors was partially debilitating which limited the type of employment Claimant was capable of performing. This is most evident in the initial denial of employment to Claimant by Employer because of these conditions.

I further find that Claimant's pre-existing disability was permanent in nature. Medical testimony confirms the chronic nature of coronary artery disease and diabetes. Because the conditions can be controlled to some extent, the extent of disability was partial prior to employment with Employer.

Lastly, I find that Claimant's pre-existing coronary artery disease resulted in a permanent partial disability such that it would motivate a cautious employer to deny employment to Claimant or discharge him because of an increased risk of a work-related accident and compensation liability. I find that Claimant's underlying coronary artery disease, coupled with other risk factors of diabetes and hypertension, even if controlled, constitute objective evidence of a permanent partial disability. Thus, I find and conclude that Claimant suffered a pre-existing permanent partial disability at the time of his work-related injury on May 23, 2004.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie, 23 BRBS at 426. Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

Claimant disclosed on pre-employment forms the existence of diabetes and hypertension. In fact, diabetes medication and uncontrolled sugar levels were the cause of Employer's denial of

employment to Claimant in October 2003. In October 2003, Claimant requested that his physicians complete and return forms given to him by Employer. Dr. Sdringola noted on one form which was returned to Employer that Claimant suffered from coronary artery disease, hypertension, and Type II diabetes. Claimant also stated that he verbally informed Employer's personnel of his medical history when he applied for the job. Finally, the employment medical questionnaire signed by Claimant on October 21, 2003, includes authorization for Employer to investigate the medical facts asserted. (See EX-5, p. 13(a)).

I find that these medical records and verbal communications by Claimant disclose that he suffered from a permanent partial disability. I further find that such records were available to Employer at all times following October 21, 2003, including the time of his injury.

Thus, I find and conclude that Claimant's pre-existing cardiac condition and related problems constituting risk factors, were manifest to Employer at the time of Claimant's May 2004 injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

Claimant has a history of coronary artery disease. His first stent was implanted in 2002. Medical testimony indicates that the disease is chronic and has a natural progression, even absent aggravating factors. Dr. Sdringola recognized the deterioration in Claimant's condition as being the possible result of multiple risk factors. Some of these risk factors to Claimant's coronary artery

disease, including obesity and other factors, existed prior to employment with Employer and existed through Claimant's deployment to Iraq.

I find that Claimant's permanent total disability that occurred after his May 2004 work-related injury is not due solely to the instant accident. I find that Claimant's pre-existing cardiac condition has combined with stress and other working conditions, including limited availability of medication and medical care culminating in aggravation of his pre-existing cardiac condition, causing him to be unable to return to his former job position as a labor foreman in Iraq, and becoming permanently totally disabled. In fact, aggravation of Claimant's underlying condition is the primary reason for his current disability.

Accordingly, I find and conclude that Employer established the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act and is eligible to receive Section 8(f) relief.

IX. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer's Application for Section 8(f) relief is hereby **GRANTED**.

2. Employer/Carrier shall pay Claimant compensation for temporary total disability from May 23, 2004 to April 29, 2005, a period of 48.7 weeks, based on Claimant's average weekly wage of $1,328.98, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer/Carrier shall pay Claimant compensation for permanent total disability from April 30, 2005 to May 22, 2006, a period of 55.3 weeks, constituting a total period of 104 weeks of payments by Employer, based on Claimant's average weekly wage of $1,328.98, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

4. After the cessation of payments by Employer, continuing benefits shall be paid pursuant to the provisions of Section 8(f) of the Act from the Special Fund established in Section 44 of the Act until further notice. 33 U.S.C. § 908(f).

5. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2005, for the applicable period of permanent total disability.

6. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 23, 2004 work injury, pursuant to the provisions of Section 7 of the Act.

7. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that installments were found to be due and owing prior to July 26, 2004, as provided herein.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 3rd day of November, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge